ARCI ENTERPRISE

v.

SELINSING MINING SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: W-01-102-2005]
9 OCTOBER 2006

PARTNERSHIP: *Suits by and against partnerships - Suing in firm's name by firm itself - Termination of registration - Effect of - Whether firm deprived of standing to continue with action - Registration of Businesses Act 1956 (Revised 1978), s. 8(1)*

In this appeal, the only issue requiring determination was whether the plaintiff firm lacked standing to prosecute the action it instituted against the defendants. The learned judge in the court below resolved that issue against the plaintiff; hence, this appeal. The plaintiff had taken out an originating summons seeking declarations and other consequential relief in respect of certain land against the first defendant. Following this, the plaintiff firm obtained an interim injunction to secure the *status quo* until the outcome of the action. Later, however, the Registrar of Businesses terminated the plaintiff's registration pursuant to s. 5C(2) of the Registration of Businesses Act 1956 (Revised 1978) ('Act') on the grounds that one of the partners in the plaintiff firm was a bankrupt and the firm was no longer carrying on its business. Relying on the post-suit events, the defendants applied to strike out the plaintiff's action. The learned judge granted that application, which also meant that the injunction fell to the ground. It was plain that the learned judge struck out the action on the ground that the plaintiff firm lacked standing to carry on with the action by reason of revocation of its business registration following the bankruptcy of two of its partners.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) Non-registration or invalid registration or default in registration does not make a contract entered into by a partner void *ab initio*. However, no suit may be brought by a partner to enforce such a contract unless he has first obtained relief from

the High Court in accordance with the proviso to s. 8(1) of the Act. But in the present case it was not a partner who was suing in the name of the plaintiff firm, but the firm itself. Accordingly, on the present facts, the revocation of the firm's registration deprived the plaintiff standing to continue with the action against the defendants. It followed that the learned judge was entirely correct in striking out the plaintiff's action. For the reasons already given, the High Court's orders were upheld and the present appeal dismissed. (paras 14 & 15)

Bahasa Malaysia *translation of headnotes*

Dalam rayuan ini, satu-satunya isu yang memerlukan keputusan adalah sama ada firma plaintif tidak mempunyai asas untuk mendakwa tindakan yang diambilnya terhadap defendan. Yang arif hakim di mahkamah di bawah memutuskan isu dengan tidak berpihak kepada plaintif, sekaligus membangkitkan rayuan di sini. Plaintif telah memulakan tindakan saman pemula terhadap defendan memohon beberapa deklarasi dan relif-relif konsekuental berhubung sebidang tanah. Berikutnya, firma plaintif mendapat injunksi interim untuk mengekalkan *status quo* sehingga tindakan selesai. Bagaimanapun, Pendaftar Perniagaan kemudian menamatkan pendaftaran plaintif di bawah s. 5C(2) Akta Pendaftaran Perniagaan 1956 (Semakan 1978) ('Akta'), atas alasan salah seorang dari rakan kongsi firma plaintif adalah seorang bankrap dan firma tidak lagi menjalankan perniagaannya. Berdasarkan kepada peristiwa-peristiwa pasca tindakan, defendan memohon untuk membatalkan tindakan plaintif. Yang arif hakim membenarkan permohonan, sekaligus melupuskan injunksi. Adalah jelas bahawa, menurut yang arif hakim, tindakan plaintif perlu dibatalkan kerana firma plaintif tidak mempunyai asas untuk meneruskan tindakan tersebut, memandangkan pendaftaran perniagaannya telah dibatalkan ekoran dari kebankrapan dua rakan kongsinya.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Ketiadaan pendaftaran atau pendaftaran tak sah atau pendaftaran yang cacat tidak menjadikan kontrak yang dimeterai oleh seorang rakan kongsi batal *ab initio*. Bagaimanapun, tindakan tidak boleh dibawa oleh mana-mana kongsi untuk melaksanakan kontrak sedemikian, kecuali jika relif diberi oleh Mahkamah Tinggi berdasarkan proviso kepada s. 8(1) Akta. Apapun, dalam kes semasa, yang mendakwa bagi pihak plaintif bukan seorang rakan kongsi, tetapi firma itu

sendiri. Ianya dengan itu mengikut bahawa, berdasarkan fakta kes, pembatalan pendaftaran telah melupuskan asas bagi membolehkan plaintif meneruskan tindakannya terhadap defendan. Seterusnya, yang arif hakim betul apabila membatalkan tindakan plaintif. Atas alasan-alasan yang diberi, perintah Mahkamah Tinggi dikekalkan dan rayuan semasa ditolak.

Case(s) referred to:

Anderson v. Balnagown Estates Co [1939] SC 168 ***(refd)***

Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor [2003] 3 CLJ 339 CA ***(refd)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***

Syarikat Bunga Raya Timor Jauh Sdn Bhd v. Tractors Malaysia Bhd [1980] 2 MLJ 127 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 44

Partnership Act 1961, s. 40

Registration of Businesses Act 1956 (Revised 1978), ss. 5(a), 5C(2), 6(1), 8(1)

Rules of the High Court 1980, O. 77 r. 1

Registration of Business Names Act 1916 [UK], s. 8(1)

For the appellant - Robert Low (William Leong & Richard Yeoh with him); M/s William Leong & Co

For the 1st respondent - Syed Mohd Fuad Ahmad; M/s Abu Zahar Syed Mohd Fuad & Partners

For the 3rd respondent - Abdul Rahman Sebli

[Appeal from High Court Malaya, Originating Summons No: S2-21-48-2000]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] There is only one issue in this appeal. It is whether the plaintiff firm (the appellant before us) lacks standing to prosecute the action it instituted against the defendants (respondents before us). The judge in the court below resolved that issue against the plaintiff. Hence this appeal. Here is the factual matrix out of which the issue arises.

[2] The plaintiff had 7 partners. They are Yee Fook Shin, Yong Kat Keong, Thein Hong Teck, Yee Fook Choy, Yee Chong Khoon, Yee Chang Man and Syed Kharul Azhar bin Syed Talib.

A The plaintiff was the registered holder of a mining certificate No. 1/113 in respect of the land held under Lot 1986, Sungai Kermoi in the State of Pahang. The mining certificate was issued by the State on 28 February 1996.

B **[3]** On or about 15 December 1998 a sublease of the mining land in question was registered in the Kuala Lipis land office in favour of the first defendant. Later, the first defendant transferred the sublease to the second defendant. That transfer was registered.

C **[4]** On 7 April 2000, the plaintiff firm took out an originating summons against the first defendant. It sought two declarations and other consequential relief. The declarations claimed are in the following terms:

D (i) a declaration that the registration of the sub-lease on the piece of land held under mining certificate 1/13 in favour of the first defendant, Selinsing Mining Sdn Bhd, *vide* presentation no. 8/98 Volume 1 Folio 35 on 15 December 1998 is invalid, null and void;

E (ii) a declaration that the registration of the transfer of the sub-lease on the piece of land held under mining certificate 1/113 from the first defendant, Selinsing Mining Sdn Bhd to the second defendant, Asian Mining Services Sdn Bhd is invalid, null and void.

F **[5]** Following this, on 29 August 2000, the plaintiff firm obtained an interim injunction to secure the status quo until the outcome of the action. The order restrained the defendants from:

G (i) being on or remaining or entering upon the land in question; or

(ii) working on the land and removing any material from it; and

(iii) disposing or dealing with the sublease in question.

H **[6]** Pending the hearing of the main action, certain events occurred which had an overriding effect on the action. On 9 July 2003 Yee Chang Man (a partner of the plaintiff firm) was adjudicated a bankrupt. About two years later, on 19 April 2005, another partner Syed Kharul Azhar bin Syed Talib was also I adjudged a bankrupt. In the meantime, on 28 October 2000, the plaintiff's business registration expired. In an attempt to meet the difficulty in which the appellant firm found itself the partners of the

plaintiff firm including the bankrupt Yee Chang Man purported to register a second firm with the same name as the plaintiff. This happened on 23 August 2004. Later, on 24 October 2005, the Registrar of Businesses terminated the appellant's registration pursuant to s. 5C(2) of the Registration of Businesses Act 1956 (Revised 1978) ("the Act") on the grounds that one of the partners in the appellant firm was a bankrupt and the firm was no longer carrying on its business.

[7] Relying on the post-suit events, the respondents applied to strike out the appellant's action. The learned judge granted that application on 15 November 2005. With that the injunction of 29 August 2000 fell to the ground. It is plain – and there is no quarrel about this – that the learned judge struck out the action on the ground that the plaintiff firm lacked standing to carry on with the action by reason of revocation of its business registration following the bankruptcy of two of its partners.

[8] On 9 January 2006 the appellant, having given notice of appeal, moved this court on an urgent basis for interim relief under s. 44 of the Courts of Judicature Act 1964. That motion came up for hearing on 18 January 2006 and was adjourned to 6 March 2006. On the adjourned date we proceeded to treat the motion for interim relief as the appeal proper. Counsel on both sides consented to this course. Compliance with the Rules of the Court of Appeal 1994 was dispensed with in view of the urgency of the matter. We may add in parenthesis that this court has ample power to make such orders. See, *Syarikat Bunga Raya Timor Jauh Sdn Bhd v. Tractors Malaysia Bhd* [1980] 2 MLJ 127; *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor* [2003] 3 CLJ 339; *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122. Having heard arguments we reserved judgment and gave leave to all counsel to put in written arguments. But we did not extend the interim injunction we had earlier granted.

[9] The plaintiff conceded that the partnership had come to an end because of the bankruptcy of two of its partners. However, it argued that that did not deprive it of standing to prosecute the action. The plaintiff relies on s. 40 of the Partnership Act 1961 which it says allows it to continue with the action until its final determination. This is because the action was filed well before the dissolution of the plaintiff. It was further submitted that an action by a partnership is essentially an action of its individual partners

hence it is maintainable despite its dissolution. Order 77 r. 1 of the Rules of High Court 1980 was prayed in aid of this submission.

[10] In order to appreciate the rival arguments presented to us it is necessary to say a few words about the Act in so far as it is relevant to the present appeal. The preamble to the Act makes it clear that it was passed to regulate the registration of businesses. The word "business" in the Act "includes every form of trade, commerce, craftsmanship, calling, profession, or other activity carried on for the purpose of gain, but does not include any office for employment or any charitable undertaking or any specified in the Schedule". It is incumbent on every person responsible for a business to make an application for registration of his business within thirty days from the commencement of the business (s. 5(a)). The effect of such registration is that it shall be evidence against him that he is an associate (that is to say a partner) of the business unless otherwise proved (s. 6(1))

[11] Non-registration of a business has certain negative consequences. This is set out in s. 8(1) of the Act as follows:

> So long as the prescribed particulars in respect of any person who is or who claims to be an associate of any business are not recorded in the register, no right of such person under or arising out of any contract made or entered into by or on behalf of such person in relation to such business shall be enforceable by suit or other legal proceeding either in the name of such business or in his individual name or otherwise;
>
> Provided that:
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> (a) such person may apply to the High Court for relief against the disability imposed by this section and such court, on being satisfied that the default was accidental or due to inadvertence or to fraud on such person or to some other sufficient cause or that on other grounds it is just and equitable to grant relief, may grant such relief, either generally or in relation to any particular contract, as to the court may seem just, on condition that the costs of the application be paid by such person (unless the court otherwise orders) and on such other conditions, if any, as the court may impose; but shall relief shall not be granted except on such service and such publication of notice of the application as the court may order nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction to the court that, if this Act had been complied with, such party would not have entered into the contract;

[12] Section 8(1) of the Act is in *pari materia* with s. 8(1) of the UK Registration of Business Names Act 1916. The effect of the equipollent section was discussed by Lord President Normand in *Anderson v. Balnagown Estates Co.* [1939] SC 168. His Lordship said:

> The suggestion was made that, when the action was raised in the name of John and Francis Anderson, it was fundamentally null under section 8 of the Registration of Business Names Act, 1916. I entirely disagree. Section 8 is concerned with rights under contracts, and, when it applies, it does not make contract null ab initio because the Courts may grant relief. The important thing is that the contract founded was entered into between Mr. Ian Pitman and Messrs John and Francis Anderson when there had been no default, and that the instance as amended is unexceptionable. For this reason the Lord Ordinary's interlocutor ought to be affirmed.

[13] Lord Moncrieff added;

> At the time the action was raised this firm, as regards registration, is said to have stood in this position-that a partner had died and on his death the firm had been dissolved, with a resulting obligation on the surviving partners to register the death in order to bring the particulars up to date by the Registration of Business Names Act, 1916. Assuming that, so long as the particulars so required for registration had not been notified, the rights of the firm would have remained unenforceable by action as provided in section 8 of that statute, that single circumstance would not make this present action a nullity, seeing that any such default on the part of the firm is by the same action rendered capable of cure.

[14] It is therefore clear that non-registration or invalid registration or default in registration does not make a contract entered into by a partner void *ab initio*. However no suit may be brought by a partner to enforce such a contract unless he has first obtained relief from the High Court in accordance with the proviso to s. 8(1). But in the present case it is not a partner who is suing in the name of the plaintiff firm. It is the firm itself. Accordingly, on the present facts, the revocation of the firm's registration deprived the plaintiff standing to continue with the action against the defendants.

[15] It follows that the learned judge was entirely correct in striking out the plaintiff's action. For the reasons already given we uphold the High Court's orders and dismiss the appeal. The appellant must pay the costs of this appeal. The deposit in court shall be paid out to the first respondent to account of its taxed costs.